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IN THE

# Supreme Court of the United States

**October Term, 1965**

**No. 518**

JOHN J. OLING, DAVID J. LANDRY, on behalf of themselves and all other "second officers" in the employ of the United Air Lines, Inc. similarly situated,
*Petitioners,*

*against*

AIR LINE PILOTS ASSOCIATION, and
UNITED AIR LINES, INC.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION IN OPPOSITION

### Opinion Below

The opinion of the United States Court of Appeals for the Seventh Circuit, dated June 4, 1965, is reported at 346 F. 2d 270.

### Jurisdiction

The judgment sought to be reviewed herein was entered on June 4, 1965. The petition for a writ of certiorari was filed on September 1, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## Statutory Provisions Involved

The relevant provisions of the Federal Aviation Act of 1958, 49 U. S. C. §§ 1371(k)(4), 1378, 1384, 1486 and 1506, are set forth at Appendix A.

## Question Presented

Following Civil Aeronautics Board approval of a merger between two air carriers, does a United States District Court have jurisdiction of an action brought by a group of employees challenging the fairness of provisions for the integration of seniority of employees of the carrier, where a prior proceeding brought by the same group of employees in the Civil Aeronautics Board which sought essentially the same relief under the labor protective provisions in the Board's merger order resulted in a determination on the merits against these employees and where these employees did not seek judicial review of the Board's order in the exclusive manner provided by statute for review of such determinations?

## Statement of the Case

Respondent Air Line Pilots Association (hereinafter "ALPA") is the certified collective bargaining representative of all flight deck crew members employed by respondent United Air Lines, Inc. (hereinafter "United"), including petitioners, who are a group of Second Officers employed by United. Respondent United is a common carrier by air, subject to the provisions of the Railway Labor Act, 45 U. S. C. § 151 *et seq.*, and the Federal Aviation Act of 1958, 49 U. S. C. § 1301 *et seq.*, (hereinafter the "Federal Aviation Act" or "Act").

This action arises from an order of the Civil Aeronautics Board (hereinafter the "CAB" or "Board"), dated April

3, 1961, which approved the merger of Capital Air Lines, Inc. (hereinafter "Capital") into United, subject, *inter alia*, to certain labor protective provisions set forth in an appendix to the order (Order No. E-16605; P.A. 18, 32-45).* These labor protective provisions directed "the integration of [Capital and United] seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining" (P.A. 35) and provided for arbitration if the carriers and employee representatives could not agree upon a merged seniority list (P.A. 35-36, 45). The CAB also expressly reserved jurisdiction to amend, modify, or add to the labor protective provisions "as circumstances may require." (P.A. 34).

Prior to the merger, ALPA had been the collective bargaining representative for United's Captains and First Officers (copilots), but not for the Second Officers (flight engineers). However, in January, 1961, the National Mediation Board found that all United flight deck crew members (Captains, First Officers and Second Officers) constituted a single craft or class for collective bargaining purposes and, on May 31, 1961, after an election, ALPA was certified as the bargaining representative for United flight deck personnel (P.A. 19-20, 50-52). All United Second Officers were invited to accept ALPA membership, and two United Second Officers were thereafter elected as special merger representatives (P.A. 20, 53, 54, 170; D.A. 17a)**. Capital flight deck crew members, all of whom were hired as pilots and served interchangeably at the three flight deck positions, had previously been represented by ALPA as a single craft or class (P.A. 19, 72).

Following the merger, the United and Capital pilot representatives were unable to agree upon an integrated senior-

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* References designated "P.A." are to the Appendix of Petitioners in the Court of Appeals.

** References designated "D.A." are to the Appendix of Respondent Air Line Pilots Association in the Court of Appeals.

ity list and the matter was duly referred to a Board of Arbitration, headed by neutral Harry Abrahams. (See ALPA Policy Manual, P.A. 20; D.A. 1a-8a).* The Abrahams Board, however, did not pass upon the seniority of United's Second Officers (P.A. 46-64), since ALPA had not been certified as their bargaining representative until after seniority merger proceedings had begun (P.A. 55-56, 21; D.A. 17a-18a).

After the failure of negotiations and mediation regarding the seniority integration of United's Second Officers, this problem also was submitted to an arbitration panel, headed by neutral David L. Cole. Petitioners, described by Arbitrator Cole as "career" or "professional" flight engineers, were permitted to participate in the hearings, even though "they would not agree to be bound by the award." (P.A. 73; D.A. 19a-20a). Their position was that they were entitled to pilot seniority credit for their entire length of service with United, "regardless of whether they were hired as pilots or flight engineers, and regardless of whether they have been serving as flight engineers or pilots." (P.A. 74).

The Cole award rejected this concept of seniority integration as an "extreme" proposal which would, *inter alia*, "reverse a great deal of history and call for a retroactive readjustment of United's pilot seniority list back to 1947." (P.A. 78). The award also stated that this position "would involve a disregard of one of ALPA's basic seniority policies" and was not "either explicitly or by inference" required by the 1961 National Mediation Board decision (P.A. 78-79). Arbitrator Cole concluded:

> "For these reasons I shall fully protect the rights of the professional flight engineers to the third seat

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* ALPA's neutral arbitration process for resolving seniority disputes in merger situations has previously received the Board's approval. See *Braniff-Mid-Continent Merger* Case, 15 CAB 708, 711 (1952) (P.A. 20).

assignments, but I see no equitable basis for placing them on the pilot seniority list ahead of others already on the list or clearly entitled to be on the list." (P.A. 79; see also paragraph (4), P.A. 82).

Thereafter, ALPA and United entered into collective bargaining negotiations based on the Cole decision (P.A. 85-86) and on June 11, 1963, concluded an agreement which incorporated the integrated seniority list (D.A. 20a-21a; P.A. 26).

Petitioners emerged from these seniority integration proceedings without the loss of any seniority rights which they possessed prior to the merger, and acquired both additional valuable seniority rights and substantial improvements in rates of pay, hours and working conditions (D.A. 15a, 32a-33a). Unlike petitioners, substantial numbers of other United employees suffered loss of seniority rights which they possessed prior to the merger, as a necessary result of compromises and accommodations made to resolve the mutually inconsistent seniority claims of the affected employee groups.

In November, 1963, the petitioners herein filed with the CAB a petition to vacate the integrated seniority list and for other relief, in an effort to obtain added seniority rights (P.A. 99-106). Petitioners alleged that United had "invidiously discriminated against petitioners as a class," causing "irreparable injury," and that "ALPA has willfully failed to perform its statutory duty as a collective bargaining agent of representing petitioners, a minority of its members, fairly and without prejudice." (P.A. 105). They also alleged that United and ALPA had deliberately attempted to subvert the CAB's labor protective provisions by discriminating between them and "all other members of the bargaining unit." (P.A. 105). The petition asserted that the CAB had jurisdiction to grant the relief sought under Section 408 of the Act, 49 U. S. C. § 1378, and the Board's merger order (P.A. 99, 34-35). ALPA and United

filed detailed statements in opposition to the petition (D.A. 9a-36a).

On April 24, 1964, the CAB dismissed the petition, finding "no basis for concluding that the seniority lists in question were not integrated in a fair and equitable manner," as directed by its labor protective provisions (P.A. 114, 106-115). The Board found "most significant" the invitation by Arbitrator Cole to petitioners "to participate as a full party in the arbitration proceeding," stating: "The election by the petitioners to refrain from being a full party and the fact that the outcome of the arbitration was disappointing to them does not derogate from the fairness of the procedures." (P.A. 114).

Though they were dissatisfied with the disposition of their claim by the CAB, petitioners chose not to petition the Court of Appeals for statutory review under Section 1006 of the Act, 49 U. S. C. § 1486, which provides the exclusive means for review of a CAB order. On September 4, 1964, after the statutory period for review in the Court of Appeals had expired, they commenced this action in the District Court, seeking to subject the order of the CAB to judicial review in the District Court.

On the motion of defendant United, supported by defendant ALPA, the District Court, on November 16, 1964, issued an order dismissing the complaint. This order was affirmed by the United States Court of Appeals for the Seventh Circuit on June 4, 1965, on the grounds that the complaint constituted an improper collateral attack upon the order of the CAB. (Pet. App. A; 346 F.2d 270).*

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* References designated "Pet. App." are to the Appendix of the instant Petition for a Writ of Certiorari.

## Argument

The decision of the Court of Appeals correctly applies established principles of law. There is no conflict of decisions. This case does not involve issues which merit the attention of this Court. There is thus no reason for further review.

Petitioners commenced this action nearly five months after the CAB had dismissed their petition, which alleged discriminatory treatment by ALPA and United in establishing their seniority rights following the United-Capital merger. Petitioners have never sought judicial review of the CAB order in a United States Court of Appeals, as provided in Section 1006 of the Federal Aviation Act, 49 U. S. C. § 1486. Instead, they began this action in the District Court, seeking a reexamination of the matters previously before the CAB and a determination which would effectively overturn the CAB order.

The decision below recognized that the CAB, under Section 408 of the Federal Aviation Act, 49 U. S. C. § 1378, may establish labor protective provisions and seniority integration procedures, as a condition of its approval of a merger between two carriers. The Board, as it did in this situation, may also expressly retain jurisdiction to implement and enforce such terms and conditions. The CAB also possesses, although it generally does not exercise, the power to actually integrate seniority lists. (Pet. App. 7a-8a; 346 F.2d at 274-275). *United-Western, Acquisition of Air-Carrier Property,* 11 CAB 701 (1950), *aff'd. sub nom. Western Air Lines* v. *CAB,* 194 F.2d 211 (9th Cir. 1952); *North Atlantic Route Transfer Case,* 12 CAB 124 (1950), 14 CAB 910 (1951); *Kent* v. *CAB,* 204 F.2d 263, 265 (2nd Cir. 1953), *cert. den.* 346 U. S. 826 (1953); *Outland* v. *CAB,* 284 F.2d 224, 228 (D. C. Cir. 1960). See also *United States* v. *Lowden,* 308 U. S. 225 (1939) and *Bhd. of Locomotive Eng'rs.* v. *Chicago and Northwestern Railway Company,* 314 F.2d 424

(8th Cir. 1963), *cert. den.* 375 U. S. 819 (1963). In addition, the CAB is expressly empowered, under Section 401(k)(4) of the Federal Aviation Act, 49 U. S. C. § 1371 (k)(4), to deal with allegations of Railway Labor Act violations by a carrier.*

The Court of Appeals, comparing petitioners' claims before the CAB and the District Court, found "some allegations in the complaint not made in plaintiffs' petition before the Board, but in essence they are the same, although in some instances couched in different phraseology." (Pet. App. 12a; 346 F.2d at 277). The Court found that "the thrust of the relief sought before the Board, as in the instant suit, rests on the premise that the seniority integration approved by the Board was not accomplished 'in a fair and equitable manner.' " (Pet. App. 13a; 346 F.2d at 277-278). The Court also stated:

> "It can hardly be doubted but that the heart of plaintiffs' contention before the Board, as well as in its complaint, is their request for relief from what they claim was their unfair listing relative to seniority rights. Other allegations in their complaint are merely subsidiary to and offered in support of that principal claim." (Pet. App. 14a; 346 F.2d at 278).

The Court came to the "inescapable" conclusion that petitioners' action "sought a review of the final order entered by the CAB on April 24, 1964" and that "their action constitutes a collateral attack upon such order." (Pet. App. 14a; 346 F.2d at 278). The Court held that petitioners had disregarded "the express terms of Sec. 1006 of the Federal Aviation Act which prescribes a direct and exclusive method of review" and "instituted the

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* Section 401(k)(4) provides:

"It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with [the Railway Labor Act]."

present action in derogation of the well settled principle that collateral attacks upon administrative orders are not permissible." (Pet. App. 11a; 346F.2d at 276-277). The Court of Appeals also noted that petitioners had pursued their CAB action "to the point of an adverse decision," (Pet. App. 14a; 346 F.2d at 278), but "no reason, much less excuse, is assigned for their failure to seek review of the Board's order in accordance with their statutory right." (Pet. App. 9a; 346 F.2d at 275-276).

The decision of the Court of Appeals that petitioners' complaint in the District Court "sought a review of the final order entered by the CAB" is correct. Here, petitioners, dissatisfied with the neutral's determination respecting their seniority rights, first petitioned the CAB, alleging discriminatory treatment in an attempt to obtain for themselves additional benefits (P.A. 99-106). They asserted that "United has invidiously discriminated against petitioners" and that "ALPA has willfully failed to perform its statutory duty as a collective bargaining agent of representing petitioners, a minority of its members, fairly and without prejudice." They also claimed that United and ALPA had discriminated against them "in bad faith and in a deliberate effort to subvert an order of the Civil Aeronautics Board which requires integration of seniority in a fair and equitable manner * * *." (P.A. 105).

After giving "careful consideration" to petitioners' allegations and statements filed by United and ALPA (D.A. 9a, 12a), the CAB, stating its reasons in detail, concluded that the seniority lists had been integrated in a "fair and equitable manner" and dismissed the petition as lacking in substantive merit (P.A. 106-115).

In the District Court, as before the CAB, the essence of petitioners' complaint is an attempt to overturn the provisions for integration of seniority approved by the CAB and to secure the added seniority to which they deem themselves entitled. Although petitioners have

reversed their position that the Board is the appropriate forum for resolving these issues (P.A. 159, 161, 172; D.A. 52a), they adhere to their claim, also made in the Cole arbitration proceeding and before the Board, that any seniority arrangement aside from the particular plan proposed by them is unfair (P.A. 4, 5, 9, 73-74, 84, 87, 100, 104-106, 126-127, 138, 176-177, 198). Thus, petitioners necessarily intend that the District Court should review the matters previously determined by the CAB and confer upon them the relief denied by the Board.

The holding of the Court of Appeals that petitioners may not maintain such an action in the District Court is based upon established law. Section 1006 of the Federal Aviation Act expressly provides that the Courts of Appeals "shall have exclusive jurisdiction" to review CAB orders, upon direct petition within 60 days after entry of the order.* The Courts have consistently held that Section 1006 deprives District Courts of jurisdiction over complaints which seek review of CAB orders, even where the attack is made under the guise of a so-called independent cause of action. See *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N. D. Ga. 1962); *Capital Airlines, Inc.* v. *United States*, 90 F. Supp. 926 (U. S. Ct. Claims 1950),

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* Section 1006 states:

"(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act * * * shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.

* * *

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court * * *.

(d) Upon transmittal of the petition to the Board or Administrator, *the court shall have exclusive jurisdiction* to affirm, modify, or set aside the order complained of * * *." (Italics added)

*cert. den.* 340 U. S. 875 (1950); *Regina Cargo Lines, Inc.* v. *CAB,* 10 FRD 628 (E. D. N. Y. 1950); *Pacific Northern Airlines, Inc.* v. *Alaska Airlines, Inc.,* 80 F. Supp. 592 (D. Alaska 1948); *Alexander* v. *CAB,* not officially reported, 2 CCH Aviation Cases 14,481 (E. D. N. Y. 1947).

The principle that CAB orders are not subject to collateral attack in a District Court, even though the claim is framed in terms of a so-called independent cause of action, reflects a uniformly applied postulate of administrative law prohibiting such collateral suits where there is a prescribed method of judicial review. See *Whitney National Bank* v. *Bank of New Orleans and Trust Company,* 379 U. S. 411 (1965), dismissing an action under the national banking laws as a collateral attack on an order of the Federal Reserve Board; *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U. S. 320 (1958), dismissing a bond validation action as a collateral attack upon an order of the Federal Power Commission; *Interstate Natural Gas Co.* v. *Southern California Gas Co.,* 209 F.2d 380, 385 (9th Cir. 1953), dismissing an action alleging violations of the Mineral Lands Act, Natural Gas Act and Sherman Anti-Trust Act as a collateral attack on an order of the Federal Power Commission; *Nichols* v. *Long Island Lighting Co.,* 207 F. 2d 931 (2nd Cir. 1953), *modif.* 211 F.2d 392 (2nd Cir. 1954), *cert. den.* 348 U. S. 827 (1954), dismissing a tort action alleging fraud and conspiracy as a collateral attack on an SEC decision; *United Merchants & Manufacturers, Inc.* v. *South Carolina Electric & Gas Co.,* 113 F. Supp. 257 (W.D.S.C. 1953), *aff'd.* 208 F.2d 685, 687 (4th Cir. 1963), dismissing a complaint alleging fraud and deceit as a collateral attack on an order of the South Carolina Public Service Commission; *Edward Chappell Co.* v. *Chesapeake & O. Ry. Co.,* 110 F. Supp. 46 (S.D.N.Y. 1952), *aff'd. per curiam,* 202 F.2d 149 (2d Cir. 1953), dismissing an action to enjoin imposition of rates as a collateral attack on an ICC order; and *Harris* v.

*Central Nebraska Public & Irrigation Dist.*, 29 F. Supp. 425 (D. Neb. 1938).*

In *Whitney National Bank* v. *Bank of New Orleans and Trust Company, supra,* this Court held that a District Court lacked jurisdiction over an action under the national banking laws, where the thrust of the complaint went to matters cognizable by the Federal Reserve Board and the applicable statute included a procedure for judicial review of Federal Reserve Board decisions. The Court found that the statutory procedure constituted the exclusive means for judicial review of Board decisions, stating:

> "This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. See, e. g., *Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507 (1953); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938); *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907)." 379 U. S. at 420.

The decision also made it clear that a Board determination could not be collaterally attacked under the guise of an independent action against the Comptroller of the Currency, stating:

> "Moreover, we reject the notion that the Board's determination may be collaterally attacked in the

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* *Cf. Service and Transfer Co., Inc.* v. *Commonwealth of Virginia,* 359 U. S. 171, 176 (1959); *Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507, 512-513 (1953); *Lambert Run Coal Co.* v. *Baltimore & O. R. Co.,* 258 U. S. 377, 381-382 (1922); *Stanley* v. *Supervisors of Albany,* 121 U. S. 535, 550 (1887); *Meyers* v. *Famous Realty, Inc.,* 271 F.2d 811, 817 (2nd Cir. 1959), *cert. den.* 362 U. S. 910 (1960); *Evarts* v. *Western Metal Finishing Co.,* 253 F.2d 637 (9th Cir. 1958), *cert. den.* 358 U. S. 815 (1958); *Elbow Lake Cooperative Grain Company* v. *Commodity Credit Corporation,* 144 F. Supp. 54, 61-62 (D. Minn. 1956), *aff'd.* 251 F.2d 633, 637 (8th Cir. 1958); *Applewhite* v. *Jones,* 207 F.2d 701 (7th Cir. 1953), *cert. den.* 347 U. S. 954 (1954); *Black River Valley Broadcasts* v. *McNinch,* 101 F.2d 235 (D. C. Cir. 1938), *cert. den.* 307 U. S. 623 (1939).

> District Court by a suit against the Comptroller. Opponents of the opening of a new bank by a bank holding company must first attack the arrangement before the Board, subject only to review by the Courts of Appeals. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958); *United States* v. *Corrick*, 298 U. S. 435 (1936). That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion." 379 U. S. at 421-422.

There is no merit to petitioners' contention that the decision below should be reviewed because it is in conflict with other decisions "on the principles to be applied where administrative agencies and the federal court have concurrent jurisdiction." (Petition, p. 15). In the instant case, the Court of Appeals specifically based its decision on the grounds that the complaint improperly sought a review of a CAB order in the District Court, and did not reach the issue whether the District Court and CAB would have had concurrent jurisdiction of the subject matter if the action were not a collateral attack, or if petitioners had moved in the District Court instead of the CAB. The Court, after concluding that petitioner's complaint constituted such an attack, stated:

> "*For this reason* the District Court properly dismissed the complaint. *Such being our conclusion, we do not reach the issue* as to whether the CAB had exclusive jurisdiction, as argued by defendants, or concurrent jurisdiction, as argued by plaintiffs." Pet. App. 14a; 346 F. 2d at 278. (Italics added)

Thus, petitioners' argument that this decision is in conflict with decisions in situations "*where* administrative agencies and the federal court have concurrent jurisdiction" is totally inapplicable.

Petitioners also erroneously rely upon the decision of this Court in *United States* v. *Philadelphia National Bank*, 374 U. S. 321 (1963) (Petition, pp. 16-17). There, the

Supreme Court, dealing for the first time with the problem of "the application of the antitrust laws to the commercial banking industry" (374 U. S. at 324), rejected an argument that the Bank Merger Act of 1960, 12 U. S. C. § 1828(c), by requiring the Comptroller of the Currency to consider the effect on competition of proposed bank mergers, immunized mergers approved by the Comptroller from the federal anti-trust laws. This decision was based upon the peculiar facts of that case, none of which are present in the instant situation. They included the absence of any express immunity from the antitrust laws in the Bank Merger Act, the limited nature of the administrative powers vested in the Comptroller, the lack of a "specific provision for judicial review" of the Comptroller's decisions, the clear legislative history of the Bank Merger Act refuting "any suggestion that applicability of the anti-trust laws was to be affected," and the Court's determination that "bank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject." 374 U. S. at 350-352.

The Court also made clear the inapplicability of the decision to the present case by expressly distinguishing the Bank Merger Act from the Federal Aviation Act, which provides in Section 414, 49 U. S. C. § 1384, that persons affected by a CAB order under Section 408 are relieved from other authority or law to the extent necessary to implement the CAB order.* 374 U. S. at 350, n. 27.

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* Section 414 provides:

"Any person affected by any order made under sections 1378 [Section 408], 1379 or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

In addition, the Court distinguished its prior decision in *Pan American World Airways, Inc.* v. *United States*, 371 U. S. 296 (1963), which involved, as does the instant situation, "facts composing the precise ingredients of a case subject to the [Civil Aeronautics] Board's broad regulatory and remedial powers * * *." 374 U. S. at 351.

Petitioners have further attempted to support the District Court's jurisdiction in this action by reliance upon Section 1106 of the Federal Aviation Act, 49 U. S. C. § 1506.* (Petition, pp. 18-19). However, Section 1106 cannot be read in isolation from the remainder of the Act, including Section 414. The most reasonable construction, already approved by the Supreme Court in a case cited by petitioners (Petition, p. 19), is that Section 1106 preserves only those remedies which are neither inconsistent with nor abrogated by the regulatory scheme set forth in the Act. *Hewitt-Robins, Inc.* v. *Eastern Freight-Ways, Inc.*, 371 U. S. 84, 89 (1962). Here, it seems clear that Congress intended to insure that implementation of CAB orders under Section 408 would not be obstructed by other laws. See, to this effect, *Pan American World Airways, Inc.* v. *United States, supra; Twentieth Century Airlines, Inc.* v. *Ryan*, — U. S. —, 74 Sup. Ct. 8, 11 (1953); *Kent* v. *CAB, supra*; *North Atlantic Route Transfer Case, supra*, 12 CAB at 129; *Bhd. of*

* Section 1106 provides:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

*Locomotive Eng'rs.* v. *Chicago and Northwestern Railway Company, supra.**

For an added reason, the Court below properly affirmed the dismissal of the complaint in this action. This Court has held that a prior administrative decision resulting from a proceeding involving the same issues between the same parties or those in privity with them is *res judicata* in a subsequent judicial action on the same claim. *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381 (1940). In that case, the plaintiff company applied to the Bituminous Coal Commission for exemption from the Bituminous Coal Act of 1937, on the grounds that it did not produce bituminous coal. The Commission denied the application. Under the Act, bituminous coal companies which did not join the "Code" established by the Act were to be taxed at higher rates than "Code" members. The plaintiff did not join the "Code" and the Collector of Internal Revenue demanded that the company pay its taxes at the higher rate. In an action by the company to enjoin such tax collection, this Court held that the underlying issue—whether the company produced bituminous coal—was the same as that upon which the administrative proceeding was predicated and that the principle of *res judicata* precluded the District Court from dealing with the matter.** See also, to

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* Petitioners also erroneously rely upon the *Delta C & S Seniority List* decision, 29 CAB 1347 (1959), which is clearly distinguishable from the instant case. There, the petitioners did not allege that ALPA had failed to perform its statutory duty of representing them fairly or negotiating with Delta regarding an integrated seniority list, or that Delta or ALPA acted in bad faith and intended to subvert the Board's order. 29 CAB at 1350. The *Delta C & S* decision dismissed the petition without reaching the merits of the case, because of the failure to make such allegations, all of which were made and ruled upon by the Board herein.

** The administrative decision therein had been upheld by a Court in the course of the statutory judicial review, but the Supreme Court did not base its holding on this factor.

the same effect, *American Air Transport, Inc.* v. *CAB*, 206 F.2d 423 (D. C. Cir. 1953); *United States* v. *3963 Bottles, More or Less*, 265 F.2d 332, 335 (7th Cir. 1959), *cert. den.* 360 U. S. 931 (1959); *George H. Lee Co.* v. *Federal Trade Commission*, 113 F.2d 583 (8th Cir. 1940) and *United States* v. *Willard Tablet Co.*, 141 F.2d 141 (7th Cir. 1944).

In the present situation, the CAB expressly reserved jurisdiction to act regarding seniority integration. Petitioners initially presented their arguments respecting the particular seniority arrangement favored by them in the Cole arbitration proceeding. Dissatisfied with Cole award and subsequent agreement, even though they lost no seniority rights and gained additional rights not possessed prior to the merger, petitioners initiated a proceeding before the CAB. The CAB could have set aside the seniority provisions complained of and granted other appropriate relief, had it concluded that ALPA and/or United had violated the merger order requiring senority integration in a "fair and equitable manner." (P.A. 35). However, the CAB, after reviewing petitioners' claims, rejected them as lacking merit. Thereafter, petitioners, ignoring the prescribed statutory review procedure, commenced the present action, once again asserting the arguments rejected by the Cole award and CAB and seeking a review of the CAB order in the District Court. It is submitted that the District Court and the Court of Appeals properly dismissed this complaint and that there is no occasion for further review of the decision below.

## CONCLUSION

**For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari be denied.**

Respectfully submitted,

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# APPENDIX A

## Statutory Provisions Involved

FEDERAL AVIATION ACT OF 1958

Section 401(k)(4), 49 U. S. C. § 1371(k)(4):

> "It shall be a condition upon the holding of a certificate by any air carrier that such carrier shall comply with [the Railway Labor Act]."

Section 408, 49 U. S. C. § 1378:

> "(a) It shall be unlawful unless approved by order of the Board as provided in this section—
>
> (1) For two or more air carriers * * * to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;
>
> * * *
>
> (b) Any person seeking approval of a * * * merger * * * specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the * * * merger * * * and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the * * * merger * * * will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such * * * merger * * * upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *."

Section 414, 49 U. S. C. § 1384:

> "Any person affected by any order made under section 1378 [Section 408], 1379 or 1382 of this title shall be, and is hereby, relieved from the operations of the 'antitrust laws' * * * and of all other restraints or prohibitions made by, or imposed under, author-

ity of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

Section 1006, 49 U. S. C. § 1486:

"(a) Any order, affirmative or negative, issued by the Board or Administrator under this Act * * * shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order.

* * *

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator, by the clerk of the court * * *.

(d) Upon transmittal of the petition to the Board or Administrator, the court, shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. * * *"

Section 1106, 49 U. S. C. § 1506:

"Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."